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Nos. [illegible] and [illegible]

In the Supreme Court of the United States

OCTOBER TERM, [illegible]1950

STANDARD OIL COMPANY OF NEW JERSEY, PETITIONER

v.

UNITED STATES OF AMERICA, AS OWNER OF THE UNITED STATES SHIP YMS-12

STANDARD OIL COMPANY OF NEW JERSEY, AS OWNER OF THE STEAM TANKER JOHN WORTHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 663

STANDARD OIL COMPANY OF NEW JERSEY, PETITIONER

v.

UNITED STATES OF AMERICA, AS OWNER OF THE UNITED STATES SHIP YMS-12

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 113-136) is reported at 81 F. Supp. 183. The opinion

of the United States Court of Appeals for the Second Circuit (R. 150-162) is reported at 178 F. 2d 488.

JURISDICTION

The judgment of the United States Court of Appeals was entered on December 15, 1949 (R. 162). The petition for a writ of certiorari was filed on March 10, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether a marine collision resulting from the negligent navigation of both colliding vessels is converted from a marine risk to a war risk, for insurance purposes, solely by reason of the fact that one of the vessels involved was a naval mine sweeper engaged in its work.

CONTRACT PROVISIONS INVOLVED

The Free of Capture and Seizure Clause, delineating war risk insurance coverage, provides (R. 118-119):

> F. C. & S. Clause. Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest, restraint, or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a dec-

laration of war or not), piracy, civil war, revolution, rebellion, or insurrection, or civil strife arising therefrom.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

The war risk endorsement provides as follows (R. 120, 134, 152):

It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

STATEMENT

The district court's findings of fact herein were based on a stipulation of the parties (R. 95-98, 113). The *YMS-12* was a mine sweeper of the United States Navy engaged in sweeping a swept channel in the approaches to New York harbor at the time of the collision (R. 114). The steam tanker *John Worthington*, owned by petitioner (R. 114), was in ballast and outward bound in convoy (R. 115). The weather was clear with good visibility (R. 115) and, as it was at night, both ships were showing their proper running lights (R. 114-115). The ships collided; the *John Worthington* sustained no damage while the *YMS-12* was damaged (R. 115). The district court found (R. 115) that the collision was

> * * * contributed to both by fault in the navigation of SS. John Worthington and fault in the navigation of the United States Ship YMS-12, consisting of failures on the part of both vessels to comply with applicable rules for the prevention of collisions and the requirements of good seamanship under the circumstances.

At the time of the collision the *John Worthington* was operating under a time charter party between petitioner and the United States (R. 115). By the terms of the charter party, petitioner was required to provide marine hull as well as protection and indemnity coverage, either by assuming the risks or by insurance (R. 116). Such coverage was not merely for petitioner's benefit as owner but was also to "* * * protect the interests of the Charterer [the United States] to the extent of the liability it would have if it were the owner of the Vessel" (R. 116). The charter party required the United States to provide war risk insurance (R. 116). Petitioner chose to assume, rather than to insure, marine risks.[1] The United States provided war risk insurance by endorsement on a marine hull insurance form, covering those risks excluded from the usual marine hull form by the customary

[1] Pet. 3, fn., criticizes the court below for stating that petitioner had obtained marine coverage (R. 152). This assumption by the court below was possibly derived from the obscure wording of the finding on the point (Finding 12, R. 121).

Free of Capture and Seizure (F. C. & S.) clause (R. 116-120; *supra*, pp. 2-3).

The instant proceeding was instituted by a libel filed by the United States against the *John Worthington* to recover $150,000 on account of the damage sustained by the *YMS-12* (R. 4-8). Petitioner's answer (R. 9-21) raised the defense, *inter alia*, that the collision was covered by the war risk binder and that the United States, as war risk insurer, was liable to it in the event that the *John Worthington* was found to be at fault (R. 20). Petitioner filed a cross libel (R. 28-38) to recover from the United States, under the war risk coverage, the costs and expense incurred in defending the collision suit (R. 37-38). The district court found that, since both vessels were at fault, petitioner was liable to the United States for one half of the collision damages to the *YMS-12* (R. 124). However, the district court found that the collision was "* * * a consequence of the warlike operation of *YMS-12*" (R. 125), and that petitioner's liability to the United States by reason of the collision was covered by the war risk insurance binder (R. 130). Further, the district court held the United States bound to indemnify petitioner, under the war risk insurance, for the cost of defending the collision suit (R. 136). Judgment was entered accordingly (R. 137-138).

On appeal, the district court judgment was reversed (R. 162-163). The court below held that the

loss to the *YMS-12* was due to a normal marine risk; that the United States was entitled to recover half damages from petitioner; and that the war risk insurance was not applicable (R. 161). It was, of course, unnecessary to consider whether the war risk insurance binder covered petitioner's cost of defending the collision suit (R. 161).

ARGUMENT

1. The petition herein, and that in No. 710, *Libby, McNeill & Libby* v. *United States*, seek to have this Court re-examine and change the well established principle employed in differentiating between marine and war risk insurance coverage in particular factual situations.[2] Here, the collision was caused, as found by both courts below, by negligent navigation on the part of both vessels (R. 115, 151). In No. 710, the stranding was caused by completely incompetent seamanship and navigation (Record in No. 710, 28-29).[3] In both cases, the request is made that this Court find that the accidents in-

[2] In the instant case, the petition presents a further question as to the use of war risk insurance as third party liability insurance (Pet. 6, 8). Inasmuch as the second question was neither reached nor passed upon by the Court of Appeals for the Second Circuit it will not be discussed in this brief in opposition.

[3] The *Branch*, the vessel involved in No. 710, struck a reef while proceeding up the inside passage from the Puget Sound area to an Alaskan port, as the direct result of the incompetence of the helmsman (Record in No. 710, 28-29). Receiving an order from the pilot to go left, the helmsman swung to the right; receiving a further call from the pilot to go hard left, the helmsman swung hard right, both swings to the right taking the vessel away from the safe channel and onto the Hammer Island reef (R. 28).

volved are to be classified as "consequences of hostilities or warlike operations" so as to bring them within the coverage of the war risk insurance binder issued by the United States. In the instant case, the basis for the request that the accident be considered a war risk is the fact that one of the vessels involved, the *YMS-12,* was a mine sweeper. The argument is made that a collision between a merchant ship and a warship during time of war is automatically a war risk (Pet. 6, 19-20). In No. 710, war risk coverage is said to exist by reason of the fact that the *Branch,* carrying cargo as an Army transport to Alaskan bases, is to be classified as a quasi-warship and that anything occurring during her voyage stems from her "warlike operation" (Pet. in No. 710, 5, 8).

We submit that the judgments of the court below in this case, and of the Court of Claims in No. 710, are entirely correct, following and applying controlling decisions of this Court, and that there is no need for review. Actually, both cases fall squarely within the rule announced, and the decision made, by this Court in *The Napoli* (*Queen Ins. Co.* v. *Globe Ins. Co.*), 263 U. S. 487. In *The Napoli,* Mr. Justice Holmes, for a unanimous Court, reaffirmed the rule, set forth as early as *Morgan* v. *United States,* 14 Wall. 531, that the distinction between marine insurance and war risk coverage was a problem of "narrow construction," to be resolved by an inquiry into the "cause nearest to the loss." 263

U. S. at 492, 493.[4] The controlling principle is thus clear. There remains, in given cases, a factual inquiry followed by the application of the principle. We do not suggest that factual inquiries in the field of legal causation are normally simple. However, in these cases, there can be no doubt as to the "cause nearest to the loss" in the sense in which those words were used in *The Napoli*, or, in fact, as to the sole cause of the accidents in any common sense meaning of the word. Here, the collision resulted from negligent navigation on the part of both vessels. In No. 710, the stranding resulted from the completely incompetent seamanship of those on board in swinging out of, instead of into, the safe channel. Both accidents are wholly comparable to the collision of two convoys which was held the "nearest cause of loss," and a marine risk, in *The Napoli, supra.*

2. The petitions for certiorari in these two cases employ an identical approach to avoid the impact of this Court's prior decisions. Mr. Justice Holmes' remark in *The Napoli*, 263 U. S. at 493, to the effect

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[4] Petitioner, in attacking the applicability of American decisions on the ground of difference in language between the coverage here and in such cases, overlooks the fact that the precise phrase here presented, "consequences of hostilities or warlike operations," was the clause before this Court in *The Napoli*, 263 U.S., at 490, 492. It should be noted that this Court found no distinction between the coverage of the clause and the war risk coverage involved in earlier cases such as *Morgan* v. *United States*, *supra*. See also the remarks of Judge Clark in the court below on this aspect of petitioner's argument (R. 152).

that there are "* * * special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business, * * *," is put forward as a rule whereby this Court commanded a mechanical adherence to English decisional law (Pet. 7, 16; Pet. in No. 710, 6, 12). Assuming this automatic guide to judgment, the petitions then assert that the court below and the Court of Claims have failed to follow certain decisions, thus controlling, rendered by the House of Lords. Principal reliance in both cases is placed on *Attorney-General* v. *Adelaide Steamship Company* (*The Warilda*), [1923] A. C. 292, and *Board of Trade* v. *Hain Steamship Company* (*The Roanoke-The Trevanion*), [1929] A. C. 534. We submit that an adequate appraisal of Mr. Justice Holmes' observation and careful consideration of the English decisions, such as that contained in the excellent opinions of Judges Clark and Madden, does not yield the result for which the petitioners contend.

(a) It should first be noted that, fairly read, Mr. Justice Holmes' observation has no particular applicability to the situation presented by these cases. Behind his remark was the assumption that he was dealing with a mercantile matter, reflected in English decisional law, whose greatest source of authority consisted of the customs and usages of British underwriters, purveying both war and marine insurance to all nations. We are, of course, no longer dealing with a mercantile matter when de-

fining the relationship, under modern conditions, of marine and war risk insurance. On the contrary, it is only fair to characterize the problem as predominantly governmental. The non-governmental war risk insurer tends to disappear from the scene as soon as modern hostilities begin on any considerable scale. The question presented is no longer one of apportioning risk between two private insurance companies, and there is, accordingly, little need to keep in harmony with the practice in England, "the great field of this business * * *" (263 U. S. at 493). Rather, petitioners' contention amounts to no more than saying, as noted by the courts below (R. 158; Record in No. 710, 40-41), that the Government, as war risk insurer, becomes liable for all marine risks and perils, with minor exceptions, whenever hostilities begin. Again, as noted by the courts below, there would be little point in the continued existence in wartime of the marine insurance industry. There would be no justification for the payment of marine insurance premiums if substantially all risks during hostilities were to be classified as war risks, the logical result of the contentions contained in the petitions (R. 158; Record in No. 710, 41).

(b) Even if it be assumed that England is to provide a crucial point of reference in deciding cases involving insurance on ships and shipping, no different result from that reached below is compelled.

As already remarked, the underlying assumption of Mr. Justice Holmes' observation in *The Napoli* is that English decisional law accurately reflected English insurance usage and understanding as to coverage. It is probable that the 1923 and 1929 decisions upon which the petitions in these cases place principal weight were not unmotivated by a national policy of shoring up the weakened financial structure of British marine insurance companies in the aftermath of World War I. But whatever the underlying occasion for certain expressions in these opinions, their reiteration by some of the law lords in *Yorkshire Dale S. S. Co., Ltd.* v. *Minister of War Transport* (*The Coxwold*), [1942] A. C. 691; obtained an immediate reaction from the British marine insurance industry which should preclude trans-Atlantic acceptance of those broad statements. In *The Coxwold*, Lord Wright pointed out that if the result of the English decisions was felt to be undesirable, the F. C. & S. Clause could be changed, stating that a "* * * contract can be changed if it does not work satisfactorily." [1942] A. C. 691 at 707.[5] The British underwriters in 1942 promptly changed the form of the F. C. & S. clause so as to make it clear that war risk coverage was limited to those occasions

[5] It should be noted that Mr. Justice Holmes made the same observation in *The Napoli*, referring to the power of the parties to "* * * shape their contract as they like * * *." 263 U.S. at 492.

when the warlike character of the operation was the direct and effective cause of loss (R. 159).[6]

(c) It should finally be noted that the English cases, upon which the petitions in this case and in No. 710 rely, by no means clearly support an attack on the decisions below. The opinion of the Court of Appeals in this case contains an excellent critical analysis of the major English cases. Throughout all of them, verbal adherence, at least, is paid to the use of causation as a means of dividing war and marine coverage. It is true that certain of the English judges have announced a so-called "umbrella" theory which looks beyond the nearest cause and constitutes, in fact, a change from the use of

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[6] In so far as marine insurance underwriters were concerned, the favorable aspects of the House of Lords decisions in the 1920's were static, conferring benefits only as to contracts already made and obligations already matured. As to future application, marine underwriters were obviously unwilling to accept the obsolescence which logically fell to their lot if substantially all risks were to be considered war risks. American underwriters displayed the same reaction to the extreme reading of *The Coxwold* and related decisions, here advocated by petitioners. At their annual meeting on October 8, 1942, the Association of Average Adjustors expressed a view that the "marine insurance world does not have to acquiesce in the views of the judges expressed in the *Coxwold* opinions * * *." The Chairman, Mr. F. Porter Gore, suggested that the "* * * F.C. & S. Clause may be redrafted so as to diminish the extent of the war risk element and build up the marine risk aspect sufficiently to justify continuance of the marine risk coverage at the prevailing high rates of premium: * * * *" *Minutes of the Annual Meeting of the Association of Average Adjustors of the United States*, October 8, 1942, p. 2612. Mercantile considerations of this character are obviously of no interest to petitioner, a self-insurer.

causation to a search for status, an attempt to outline mechanically the consequences of various physical situations class by class. Thus, it is said that any collision with a war ship is a war loss and that any merchant ship carrying war cargo to a forward base is a "quasi-warship", with the result that any eventuality which befalls her on her voyage is a "consequence of hostilities or warlike operations." Such theories are summarized in the speech of Lord Porter in *The Coxwold*, [1942] A. C. 691, 715-716. Throughout these cases, however, there is no clear abandonment of the rule of causation adhered to by this Court in *The Napoli*, and the actual holdings can all be explained on that basis. See analysis of these cases, and materials cited, by Judge Clark in his opinion in the court below (R. 153-156). On the contrary, two of the five law lords speaking in *The Coxwold*, the Lord Chancellor (Viscount Simon) and Lord MacMillan, rested their decision on the usual proximate cause inquiry. And the most recent decision by the House of Lords, *Liverpool and London War Risks Association, Limited* v. *Ocean S. S. Co., Limited* (*The Priam*), [1948] A. C. 243, indicates plainly that primary importance again attaches to proximate causation, as used in *The Napoli*, in apportioning risk as between war and marine insurance, and that status (*i.e.*, being engaged in a warlike operation) does not in and of itself automatically allocate the risk to the war insurer.

3. The question presented is not one of general importance. Contracts are no longer written with the language here involved. In the main, the allocation of risk between the United States and the marine underwriters, in claims arising out of World War II contracts, has been concluded as a result of general agreement and settlement. The instant case arises solely because petitioner chose to assume the marine risks as self-insurer and so is not embraced in any general settlement. Most of the cases listed in the petition for certiorari (Pet. 10-12) were brought by Standard or its subsidiary, Panama Transport Company. In so far as we can ascertain, there are no cases pending outside the Southern District of New York, with the exception of No. 710. There is thus no necessity for review by this Court in order to put widespread litigation at rest.

4. The conflict asserted by the petitions in this case and in No. 710 with the decision of the Court of Appeals for the Ninth Circuit in *General Insurance Co. of America* v. *Link* (*The Eastern Prince-U. S. S. Roustabout*), 173 F. 2d 955, is not such as to require resolution. As noted above, all of the pending litigation is controlled by the decision of the court below in this case, and post-World War II controversy of this character will be governed by

different clauses.[7] Moreover, as pointed out by the court below (R. 158-159), the decision in the *Link* case stemmed from an erroneous application of Mr. Justice Holmes' observation in *The Napoli* and a failure to follow or give weight to controlling decisions of this Court and other federal courts.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1950.

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[7] The Ninth Circuit remarked that the *Link* case "is interesting as one of the last, if not the last, construing the conventional F. C. & S. clause, universally used by insurers since 1883, since both the American and British underwriters have now modified their war liability exclusion clauses to meet the conflicting decisions of the British and American cases." 173 F. 2d, at 956, fn. 1.

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